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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[130325286-3653-01]

RIN 0648-BC69

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Replacement of the Elliott Bay Seawall in Seattle, Washington

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS, upon application from the City of Seattle's Department of Transportation (SDOT), is issuing regulations to govern the unintentional taking of marine mammals incidental to construction associated with the replacement of the Elliott Bay Seawall in Seattle, Washington, for the period October 2013 to October 2018. These regulations allow for the issuance of Letters of Authorization (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of any takings.

DATES: Effective October 21, 2013, through October 21, 2018.

ADDRESSES: A copy of SDOT's application and other supplemental documents, may be obtained by visiting the internet at:

<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined 'negligible impact' in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Except with respect to certain activities not pertinent here, the MMPA defines ‘harassment’ as: “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [“Level A harassment”]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [“Level B harassment”].”

Summary of Request

On September 17, 2012, NMFS received a complete application from SDOT requesting authorization for the take of nine marine mammal species incidental to replacement of the Elliott Bay Seawall in Seattle, Washington, over the course of 5 years. The purpose of the project is to reduce the risks of coastal storm and seismic damage and to protect public safety, critical infrastructure, and associated economic activities in the area. Additionally, the project would improve the degraded ecosystem functions and processes of the Elliott Bay nearshore around the existing seawall. Noise produced during pile installation and removal activities has the potential to take marine mammals. SDOT requested, and NMFS will authorize through associated Letters of Authorization (LOAs), the take of nine marine mammal species by Level B harassment only: Pacific harbor seal (*Phoca vitulina*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall’s porpoise (*Phocoenoides dalli*), southern resident and transient killer whales (*Orcinus orca*), humpback whale (*Megaptera novaengliae*), and gray whale (*Eschrichtius jubatus*). Injury or mortality is unlikely during the project, and take by Level A harassment (including injury) or mortality is not authorized.

Description of the Specified Activity

The proposed rule contains a complete description of SDOT's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the related LOAs (78 FR 22096, April 12, 2013). In summary, SDOT proposes to replace the Elliott Bay Seawall from South Washington Street to Broad Street, along the Seattle waterfront abutting Elliott Bay in King County, Washington. The purpose of the project is to reduce the risks of coastal storm and seismic damages and to protect public safety, critical infrastructure, and associated economic activities along Seattle's central waterfront. Additionally, the project will improve nearshore ecosystem functions and processes in the vicinity of the existing seawall. The project will be constructed in two phases: Phase 1 will extend for about 3,600 linear feet (ft) (1 kilometer (km)) from South Washington Street to Virginia Street, and Phase 2 will extend for about 3,500 linear ft (1 km) from Virginia to Broad Streets.

The new seawall will be constructed landward of the existing seawall face and result in a net setback of the wall from its existing location. The majority of seawall construction will occur behind a temporary steel sheet pile containment wall that will be placed waterward of the existing seawall complex and extend the full length of the construction work area during each construction season. The narrative description of the project contained in the proposed rule has not changed and is not repeated in full here. Tables 1, 2, and 3 below list the methods, durations, and locations of pile driving activities.

Table 1. Temporary containment wall installation and removal (steel sheet piles only).

Construction Phase	Pile Pairs ¹ (10% contingency included)	Maximum Duration (days)	Maximum Hours per Day	Installation/Removal Method
Installation				
Phase 1 (Years 1-3)	1,023	60	12	vibratory

Estimated number of piles that would require proofing ²	205	4 ³	10	impact
Phase II (Years 4-5)	717	40	12	vibratory
Estimated number of piles that would require proofing ²	143	3 ⁴	10	impact
Removal				
Phase I	1,023	25	12	vibratory
Phase II	717	15	12	vibratory
Total Installed/Removed	1,740	-	-	-

¹ Steel sheet pile pairs only (48 inches wide), which are two interlocking sheet piles installed as one unit.

² Number equals 20 percent of estimated number of piles installed per phase.

³ Total estimated installation time is 8 hours of actual impact driving.

⁴ Total estimated installation time is 12 hours of actual impact driving.

Table 2. Existing pile removal (timber and concrete piles only).

Construction Phase	Piles ¹	Pile Type	Justification for Removal	Maximum Duration (days)	Maximum Hours per Day	Removal Method
Phase 1 (Excluding Washington Street Boat Landing)	20	Creosote-treated timber ²	Currently not used; from previous uses along wall	2	12	vibratory
Phase I (Washington Street Boat Landing Only)	8	Creosote-treated timber ²	Support existing pier structure	1	12	vibratory
Phase II	49	Creosote-treated timber ²	Currently not used; from previous uses along wall	2	12	vibratory
Phase II	3	Concrete ³	Currently not used; from previous uses along wall	1	12	vibratory
Total Removed	80	-	-	6	-	-

¹ Number includes 10 percent contingency.

² Assumed to be 14-in diameter.

³ Assumed to be 18-in diameter.

Table 3. Permanent pile installation (16.5-in-diameter (42-cm) precast concrete octagonal piles only).

Construction Phase	Piles	Justification for Installation	Maximum Duration (days)	Maximum Hours per Day	Installation Method
Phase I (Excluding Washington Street Boat Landing)	92	To support sidewalk, viewing areas, and vehicular traffic access	11	10	Impact
Phase I (Washington Street Boat Landing Only)	15	To support new pier structure	2	10	Impact
Phase II	83	To support sidewalk and viewing areas	10	10	Impact
Total Installed	190	-	23	-	-

Dates and Duration of Specified Activity

Seawall construction is expected to occur in two phases: Phase 1, which includes the area of the Central Seawall, and Phase 2, which includes the area of the North Seawall (Table 4). Phase 1 includes three construction segments, and Phase 2 includes two construction segments; each segment represents 1 to 2 years of construction. Construction is scheduled to begin with Phase I work in fall 2013. The three segments of Phase 1 will be constructed over three construction seasons with two summer shutdown periods from Memorial Day weekend through Labor Day weekend to accommodate the primary tourist and business season. Phase 2 construction is expected to begin following completion of Phase 1 and will occur over two 2-

year construction seasons with a summer shutdown period each year. SDOT's request covers the construction period from 2013 to 2018, from the start of Phase 1, Segment 1 to the end of Phase 2, Segment 1. A request for another MMPA authorization would be submitted for any further construction.

Table 4. Proposed project construction schedule.

Phase	Segment	Duration
1 (Central Seawall)	I	Year 1 (Fall 2013 - Spring 2014)
	II	Year 2 (Fall 2014 - Spring 2015)
	III	Year 3 (Fall 2015 - Spring 2016)
2 (North Seawall)	I	Years 4 and 5 (Fall 2016 - Spring 2018)
	II	Years 6 and 7 (Fall 2018 - Spring 2020)*

*Note: Years 6 and 7 will not be covered under this LOA request because the MMPA limits incidental take authorizations to 5-year periods.

Specified Geographical Region

The description of the specified geographical region has not changed from the proposed rule and a summarized version is provided here. The Elliott Bay Seawall runs along the downtown Seattle waterfront in King County, Washington. SDOT's project will occur between South Washington Street and Broad Street, which abut Elliott Bay, a 21-square kilometer (km²) urban embayment in central Puget Sound. This is an important industrial region and home to the Port of Seattle, which ranked as the nation's sixth busiest U.S. seaport in 2010.

The region of the specified activity (or "area of potential effects," as described in SDOT's application) is the area in which elevated sound levels from pile-related activities could result in the take of marine mammals. This area includes the proposed construction zone, Elliott Bay, and a portion of Puget Sound. The area of in-water pile installation and removal activities will be restricted to the length of the seawall and waterward to within 15 ft (4.6 m) of the seawall face, and to depths less than 30 feet (9.1 m). Sounds from vibratory pile installation may

propagate up to 2.5 miles (4 km) from the sound source with high enough sound levels to meet NMFS' acoustic threshold criteria for marine mammal harassment (see Sound Thresholds section below).

Brief Background on Sound

The proposed rule contains a section that provides a brief background on the principles of sound that are frequently referred to in this rulemaking (78 FR 22096, pages 22099-22102). This section also includes a discussion of the functional hearing ranges of the different groups of marine mammals (by frequency) as well as a discussion of the two main sound metrics used in NMFS' analysis (sound pressure level and sound energy level), a description of the sound produced by different pile installation/removal methods (pulsed vs. non-pulsed sounds), and how NMFS' acoustic threshold criteria applies to SDOT's project. The information in the proposed rule has not changed and is not repeated here.

Description of Marine Mammals in the Area of the Specified Activity

Nine marine mammal species, including ESA-listed distinct population segments, have the potential to occur in the area of the specified activity (Table 5). All nine species have been observed in Puget Sound at certain periods of the year. The proposed rule contains a discussion of each species' description, status, behavior and ecology, and vocalizations. The Description of Marine Mammals in the Area of the Specified Activity has not changed from what was in the proposed rule (78 FR 22096, pages 22102-22108).

Table 5. Marine mammal species or ESA-listed distinct population segments that could occur in the proposed project area.

Common Name	Scientific Name	ESA Status	MMPA Status	Abundance	Population Status	Likelihood of Occurrence	Seasonality
Pinnipeds							
Pacific harbor seal	<u>Phoca vitulina</u>	-	-	n/a	unknown	Occasional	Year-round

California sea lion	<u>Zalophus californianus</u>	-	-	296,750	increasing	Occasional	August - April
Steller sea lion	<u>Eumetopias jubatus</u>	Threatened	Depleted	58,334-72,223	increasing	Rare	August - April
Cetaceans							
Harbor porpoise	<u>Phocoena phocoena</u>	-	-	unknown	unknown	Rare	Year-round
Dall's porpoise	<u>Phocoenoides dalli</u>	-	-	42,000	unknown	Rare	Winter - Spring
Southern resident killer whale DPS	<u>Orcinus orca</u>	Endangered		84	unknown	Occasional	Year-round
Transient killer whale	<u>Orcinus orca</u>	-	-	346	unknown	Rare	Year-round
Humpback whale	<u>Megaptera novaengliae</u>	Endangered	Depleted	2,043	increasing	Rare	February - June
Gray whale	<u>Eschrichtius robustus</u>	-	-	18,000	increasing	Rare	January - September

Potential Effects of the Specified Activity on Marine Mammals

In the Potential Effects of the Specified Activity on Marine Mammals section of the proposed rule, NMFS included a qualitative discussion of the different ways that in-water construction activities associated with the Elliott Bay Seawall project may potentially affect marine mammals (78 FR 22096, pages 22108-22113). Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in this section of the proposed rule has not changed and is not repeated here.

Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and their habitat, paying particular attention to rookeries, mating grounds, and areas of

similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

NMFS reviewed the proposed Elliott Bay Seawall project activities and the proposed mitigation measures as described in SDOT's application to determine if they would result in the least practicable adverse effect on marine mammals. The proposed rule included a list of proposed mitigation measures, which were carried over to the regulatory text of this document and are listed below. In addition, boat-based observers may be used to monitor the exclusion zones during poor visibility in areas of open water. Exclusion zones and thresholds located close to the source of pile-related noise will be demarcated with temporary buoys, as feasible.

Based on our evaluation of the proposed measures and other measures considered by NMFS or recommended by the public during the public comment period, NMFS has determined that the required mitigation measures (including the Adaptive Management component, see below) constitute means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. The proposed rule contains further support for this finding in the Mitigation Conclusion section (78 FR 22096, page 22115). During the public comment period, one mitigation measure not previously considered was recommended, and is included in the Comments and Responses section of this document. In summary, SDOT will implement the following mitigation measures:

- Limited impact pile driving;
- Containment of impact pile driving;
- Additional attenuation measures (e.g., bubble curtains, as necessary);
- Ramp-up of pile driving operations;

- Marine mammal exclusion zones;
- Shutdown and delay procedures; and
- Boat-based mitigation monitoring, as necessary.

Monitoring

In order to issue an incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth, where applicable, “requirements pertaining to the monitoring and reporting of such taking.” The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

NMFS reviewed the proposed monitoring plan as described in SDOT’s application. The proposed rule included a list of proposed monitoring measures, which have been carried over in the regulatory text of this document. During the public comment period, a monitoring measure not previously considered was recommended, and is included in the Comments and Responses section of this document. SDOT’s required monitoring measures are as follows:

- Shore-based visual monitoring; and
- Acoustic monitoring to confirm estimated noise levels.

Adaptive Management

In accordance with 50 CFR 216.105(c), regulations for the specified activity must be based on the best available information. The use of adaptive management allows NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such

modifications are appropriate. The following are some of the possible sources of applicable data:

- Results from SDOT’s monitoring from the previous year;
- Results from general marine mammal and sound research; or
- Any information revealing that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Reporting

In order to issue an incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth “requirements pertaining to the monitoring and reporting of such taking.” Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. The proposed rule contains the reporting requirements for SDOT, and these requirements remain unchanged (78 FR 22096, pages 22116-22117).

Comments and Responses

On April 12, 2013 (78 FR 22096), NMFS published a proposed rule in response to SDOT’s request to take marine mammals incidental to the Elliott Bay Seawall project and solicited comments, information, and suggestions concerning the proposed rule. NMFS received one comment letter from the Marine Mammal Commission (Commission). The comments are summarized and addressed below.

Comment 1: The Commission recommended that NMFS (1) justify its conclusion that taking up to 19 percent of the southern resident killer whale population each year would be considered “small numbers,” (2) provide a basis for that threshold, and (3) work with the Fish and Wildlife Service and the Commission to develop a policy that sets forth the criteria and/or

thresholds for determining what constitutes “small numbers” and “negligible impact” for the purpose of authorizing incidental takes of marine mammals.

Response: Section 101(a)(5)(A) of the MMPA allows for the incidental take of small numbers of marine mammals of a species or population stock. Since there are only 84 animals (the proposed rule mistakenly said 86, but 84 is considered the best available data from the Center for Whale Research in Friday Harbor, Washington; this does not change our small numbers finding) in the Eastern North Pacific Southern Resident stock, 16 animals equates to 19 percent of the stock. We believe the take of 16 animals represents a small number relative to the affected species or stock. This is consistent with small numbers determinations that NMFS has made in the past for this stock (see, e.g., 78 FR 23910, April 23, 2013).

During vibratory pile driving, sound levels that meet NMFS’ current acoustic threshold for Level B harassment may extend 6,276 meters (3.9 miles) from the seawall and into Puget Sound. The Eastern North Pacific Southern Resident stock of killer whales is known to transit this portion of Puget Sound and may be in the area during in-water pile driving activities. Because it is not practicable for SDOT to shut down or delay pile driving activities whenever a large whale is anywhere within almost 4 miles from the seawall, NMFS decided to authorize the take of 16 southern resident killer whales by Level B behavioral harassment. The southern resident killer whales most likely to be in the area are part of the J-pod, which has 26 members. The entire J-pod may transit through the action area more than once in a single year. However, here killer whales tend to stay near the open channel, farther away from the sound source; moreover, the size and sightability of the animals makes shutdown/delay of pile driving operations feasible even out to the edge of the Level B harassment isopleth for vibratory pile driving. So, killer whales are not expected to enter zones where harassment may occur often, but

effective mitigation is in place to minimize take to the degree necessary. Although shutting down is possible, because it incurs a cost to activity effectiveness, the applicant requested NMFS authorize the Level B take of 16 animals. Because this percentage of the stock (19 percent) is relatively small and we were able to make a negligible impact determination, NMFS is authorizing that take.

NMFS has required numerous mitigation measures that apply to large whales, including exclusion zones during impact and vibratory pile driving to prevent the take of large whales by Level A harassment and reduce the take of large whales by Level B harassment. While the large whale exclusion zone (3,981 m [2.5 miles]) does not extend to the Level B harassment isopleth for vibratory pile driving, it does cover a majority of the radius and allows for protected species observers to easily monitor the entrance of Elliott Bay from land. The entire J-pod (26 animals) may travel together, but once 16 individuals enter the Level B harassment zone (which will be continuously monitored by visual observers) during vibratory pile driving activities over a 1-year period, SDOT will shutdown or delay pile driving operations for the remainder of the year if a southern resident killer whale approaches the Level B harassment zone (i.e., only 16 southern resident killer whales may be exposed to sound levels equating to Level B harassment each year).

The rationale for our decisions on each authorization requested, including our negligible impact and small numbers determinations, is provided in the required Federal Register notice and underlying administrative records. NMFS strives to ensure that decisions across our program are systematic, consistent, and transparent. As we have done in the past, NMFS will continue to collaborate with the Commission and U.S. Fish and Wildlife Service on a variety of MMPA

issues, including small numbers and negligible impact, to strengthen our collective understanding of how activities affect marine mammal species and stocks.

Comment 2: The Commission recommended that NMFS require the applicant to implement ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a pinniped or small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown due to the presence of a medium- or large-sized cetacean.

Response: NMFS has added a mitigation measure requiring the applicant to implement ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown to the presence of a larger cetacean. However, due to the observed behavior of pinnipeds near the seawall, NMFS is not requiring the applicant to implement ramp-up procedures after 15 minutes following delay or shutdown because of the presence of a pinniped within or approaching the exclusion zone. Previous activities around Elliott Bay have shown that many pinnipeds do not respond to pile driving activities and will remain in the surrounding area despite construction noise. Further delays during pile driving may prove impracticable for the construction schedule and NMFS does not believe ramp-up procedures would necessarily provide better protection for pinnipeds in this case.

Comment 3: The Commission recommended that NMFS require the applicant to monitor for marine mammals not only before and during pile driving and removal activities, but for 30 minutes after all pile driving and removal activities have ended.

Response: NMFS has added 30 minutes of monitoring following pile driving and removal activities.

Changes to the Proposed Rule

As described in the Comments and Responses section above and summarized here, NMFS added two measures to the proposed rule (78 FR 22096, April 12, 2013) as a result of the public comment period:

- Implementation of ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown to the presence of a larger cetacean; and
- Visual monitoring for 30 minutes following pile driving and removal activities.

Otherwise, there are no changes to mitigation, monitoring, or the results of NMFS' analysis.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines 'harassment' as: "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]." Take by Level B harassment only is anticipated as a result of the installation and removal of piles via impact and vibratory methods. No take by injury, serious injury, or death is anticipated.

In the Estimated Take by Incidental Harassment section of the proposed rule, NMFS related the potential effects to marine mammals from pile driving activities to the MMPA

statutory definitions of Level A and Level B harassment and provided a quantitative estimate of the number of takes of marine mammals predicted from the Elliott Bay Seawall project. The information in the proposed rule has not changed and is summarized in Table 6 below.

Table 6. Estimated marine mammal takes for proposed authorization.

Species	Estimated Maximum Number of Takes Per Day	Average number of pile driving days per year	Estimated Number of Takes Per Year	Percentage of Stock that may be Taken
Harbor seal	20	35 (vibratory + impact)	700	4.8
California sea lion	5	35 (vibratory + impact)	175	<0.1
Steller sea lion	5	35 (vibratory + impact)	175	0.3
Harbor porpoise	9	29 (vibratory)	315	2.9
Dall's porpoise	2	29 (vibratory)	70	0.2
Killer whale (Southern resident)	-	-	16	19
Killer whale (transient)	-	-	24	6.9
Gray whale	-	-	8	<0.1
Humpback whale	-	-	4	0.2

Effects on Marine Mammal Habitat

NMFS' proposed rule includes a section that addresses the effects of the Elliott Bay Seawall project on marine mammal habitat (78 FR 22096, pages 22113-22114). The analysis preliminarily concluded that pile driving activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the

proposed rule and NMFS has concluded there would be minimal effects on marine mammal habitat.

Negligible Impact and Small Numbers Analyses and Determinations

As a preliminary matter, we typically include our negligible impact and small numbers analyses and determinations under the same section heading of our Federal Register notices. Despite co-locating these terms, we acknowledge that negligible impact and small numbers are distinct standards under the MMPA and treat them as such. The analyses presented below do not conflate the two standards; instead, each standard has been considered independently and we have applied the relevant factors to inform our negligible impact and small numbers determinations.

NMFS has defined ‘negligible impact’ in 50 CFR 216.103 as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) the number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

In this section of the proposed rule, NMFS discussed the potential for exposure, severity of the anticipated effects on marine mammals, including species-specific discussions, to preliminarily determine that the Elliott Bay Seawall project would have a negligible impact on marine mammal species and stocks present in Elliott Bay. No changes have been made to the discussion contained in the proposed rule (78 FR 22096, pages 22118-22119). In summary, NMFS believes that the estimated take represents a worst-case scenario: any potential for injury

is discountable due to the small size of the zones in which injury may occur and the required mitigation zones, any behavioral changes for marine mammals would be short-term, and any adverse effects to marine mammal habitat or prey species would be temporary and unlikely to have a significant impact on marine mammals. Furthermore, the estimated numbers of marine mammals taken is relatively small for each species or stock (19 percent for southern resident killer whales and less than 7 percent for all other species or stocks). Based on the analysis summarized here and detailed in the proposed rule (and other related documents) of the likely effects of the specified activity on marine mammals and their habitat, and considering the implementation of mitigation and monitoring measures, NMFS finds that the total taking from pile driving activities in Elliott Bay are not expected to impact annual rates of recruitment or survival. Therefore, the total taking will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

In this section of the proposed rule, NMFS discussed historical subsistence harvest of marine mammals in the region of the specified activity and there are no changes to that information (78 FR 22096, pages 22119-22120). NMFS determined that the total taking of affected species or stocks from the Elliott Bay Seawall project will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes. We have further determined the issuance of these regulations and subsequent LOAs will not affect the availability of affected species or stocks for taking for any subsistence uses specified under section 101(a)(5)(A)(i)(I). The activities will be limited to Elliott Bay, Washington, and there are no cooperative agreements in force under the MMPA or the Whaling Convention Act of 1949 with any Pacific Northwest treaty Indian tribes for subsistence uses of marine mammals

in this area. Moreover, the taking of marine mammals incidental to the Elliott Bay Seawall project will not affect subsistence uses of marine mammals by Alaska Natives.

Endangered Species Act (ESA)

Steller sea lions are listed as threatened under the ESA as two distinct population segments (DPSs). The eastern DPS was proposed for delisting under the ESA on April 18, 2012 (77 FR 23209), based on observed annual rates of increase. NMFS has not yet made a final decision. The Eastern North Pacific Southern resident stock of killer whales and humpback whales are listed as endangered under the ESA. The applicant initiated section 7 consultation with NMFS Northwest Regional Office, and NMFS Office of Protected Resources, Permits and Conservation Division also consulted on its proposed incidental take regulations. NMFS Northwest Regional Office issued a Biological Opinion that concluded the Elliott Bay Seawall project and NMFS' authorization of incidental take are not likely to jeopardize the continued existence of threatened or endangered species under NMFS' jurisdiction or destroy or adversely modify any designated critical habitat.

National Environmental Policy Act (NEPA)

The Army Corps of Engineers prepared an Environmental Assessment (EA) for the regulatory permit (section 404/10) required for Elliott Bay Seawall project. NMFS prepared an independent NEPA analysis, which included an EA and Finding of No Significant Impact (FONSI). These documents are available on our website at

<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. NMFS determined that issuance of the rulemaking and subsequent LOAs will not significantly impact the quality of the human environment and that preparation of an Environmental Impact Statement is not required.

Classification

The Office of Management and Budget (OMB) has determined that this rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified at the proposed rule stage to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities (78 FR 22096, April 12, 2013). No comments were received on the certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations and subsequent LOAs, and monitoring reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see ADDRESSES).

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in effective date of the measures contained in the final rule. Clearance of this rule was delayed due to unforeseen changes in the description of the applicant's action for section 7 purposes under the Endangered Species Act. Delaying the effectiveness of this rule would be contrary to the public interest, because it would delay construction activities. SDOT needs to begin pile driving

activities as soon as possible in order to maintain their multi-year construction schedule, especially considering that construction is shutdown each summer to accommodate the primary tourist and business season. Therefore, these measures will become effective upon publication.

List of Subjects in 50 CFR Part 217

Imports, Marine mammals, Reporting and recordkeeping requirements.

Dated: October 18, 2013.

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Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy
Assistant Administrator for Regulatory Programs,
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For reasons set forth in the preamble, 50 CFR part 217 will be amended as follows:

PART 217 – REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS
INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.

2. Subpart W is added to part 217 to read as follows:

Subpart W – Taking and Importing Marine Mammals; Elliott Bay Seawall Project
Sec.

217.220 Specified activity and specified geographical region.

217.221 Effective dates and definitions.

217.222 Permissible methods of taking.

217.223 Prohibitions.

217.224 Mitigation.

217.225 Requirements for monitoring and reporting.

217.226 Letters of Authorization.

217.227 Renewals and Modifications of Letters of Authorization.

Subpart W – Taking of Marine Mammals Incidental to the Elliott Bay Seawall Project

§ 217.220 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Elliott Bay Seawall project and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section incidental to seawall construction associated with the Elliott Bay Seawall project.

(b) The taking of marine mammals by the City of Seattle’s Department of Transportation (SDOT) may be authorized in a Letter of Authorization (LOA) only if it occurs in Elliott Bay, Washington.

§ 217.221 Effective dates.

This subpart is effective October 21, 2013, through October 21, 2018.

§ 217.222 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.226 of this chapter, the Holder of the LOA (hereinafter “SDOT” and “City”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.220(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.220(a) is limited to the indicated number of Level B harassment takes of the following species/stocks:

- (1) Harbor seal (Phoca vitulina) – 3,500 (an average of 700 animals per year)
- (2) California sea lion (Zalophus californianus) – 875 (an average of 175 animals per year)
- (3) Steller sea lion (Eumetopias jubatus) – 875 (an average of 175 animals per year)
- (4) Harbor porpoise (Phocoena phocoena) – 1,575 (an average of 315 animals per year)
- (5) Dall’s porpoise (Phocoenoides dalli) – 350 (an average of 70 animals per year)
- (6) Killer whale (Orcinus orca), Eastern North Pacific Southern resident – 80 (a maximum of 16 animals per year)
- (7) Killer whale (Orcinus orca), Eastern North Pacific transient – 120 (an average of 24 animals per year)
- (8) Gray whale (Eschrichtius robustus) – 40 (an average of 8 animals per year)
- (9) Humpback whale (Megaptera novaeangliae) – 20 (an average of 4 animals per year)

§ 217.223 Prohibitions.

Notwithstanding takings contemplated in § 217.222(b) and authorized by an LOA issued under § 216.106 and § 217.226 of this chapter, no person in connection with the activities described in § 217.220 may:

- (a) Take any marine mammal not specified in § 217.222(b);
- (b) Take any marine mammal specified in § 217.222(b) other than by incidental, unintentional Level B harassment;
- (c) Take a marine mammal specified in § 217.222(b) if NMFS determines such taking results in more than a negligible impact on the species or stock of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 and 217.226 of this chapter.

§ 217.224 Mitigation.

(a) When conducting the activities identified in § 217.220(a), the mitigation measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented.

These mitigation measures include:

(1) Limited Impact Pile Driving. (i) All sheet piles shall be installed using a vibratory driver, unless impact driving is required to install piles that encounter consolidated sediments or for proofing load bearing sections.

(ii) Any impact driver used in conjunction with vibratory pile driving shall employ sound attenuation devices, where applicable.

(iii) Any attenuation devices that become available for vibratory pile driving shall be considered for additional mitigation.

(2) Containment of Impact Pile Driving. The majority of permanent concrete piles shall be driven behind the temporary containment wall.

(3) Additional Attenuation Measures. In the event that underwater sound monitoring shows that noise generation from pile installation exceeds the levels originally expected, SDOT shall immediately notify NMFS so it can evaluate the need for implementation of additional attenuation devices or other mitigation measures.

(4) Ramp-up. (i) Ramp-up shall be used at the beginning of each day's in-water pile-related activities or if pile driving has ceased for more than 1 hour.

(ii) If a vibratory hammer is used, contractors shall initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. This procedure shall be repeated two additional times before full energy may be achieved.

(iii) If a non-diesel impact hammer is used, contractors shall provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(iv) Ramp-up shall be implemented if pile driving or removal is delayed or shutdown for >15 minutes due to the presence of a delphinid or pinniped within or approaching the exclusion zone, or if pile driving or removal is delayed or shutdown for >30 minutes due to the presence of a large whale.

(5) Marine Mammal Exclusion Zones. (i) The following exclusion zones shall be established to prevent the Level A harassment of all marine mammals and to reduce the Level B harassment of large whales:

(A) An exclusion zone for delphinids or pinnipeds shall be established with a radius of 200 feet (61 meters) waterward of each steel sheet pile during impact pile driving;

(B) An exclusion zone for delphinids and pinnipeds shall be established with a radius of 50 feet (15 meters) waterward of each concrete pile during impact pile driving;

(C) An exclusion zone for large whales shall be established with a radius of 3,280 feet (1,000 meters) waterward of each steel sheet or concrete pile during impact pile driving;

(D) An exclusion zone for large whales shall be established with a radius of 2.5 miles (3,981 meters) waterward of each steel sheet pile during vibratory pile driving.

(ii) Temporary buoys shall be used, as feasible, to mark the distance to each exclusion zone during in-water pile-related activities.

(iii) The exclusion zones shall be used to provide a physical threshold for the shutdown of in-water pile-related activities.

(iv) At the start of in-water pile related activities each day, a minimum of one qualified protected species observer shall be staged on land (or an adjacent pier) near the location of in-water pile-related activities to document and report any marine mammal that approaches or enters a relevant exclusion zone throughout the day.

(v) Additional land-based observers shall be deployed if needed to ensure the construction area is adequately monitored.

(vi) Observers shall monitor for the presence of marine mammals 30 minutes before, during, and for 30 minutes after any in-water pile-related activities.

(vii) In-water pile-related activities shall not occur if any part of the exclusion zones are obscured by fog or poor lighting conditions.

(6) Shutdown and Delay Procedures. (i) If a marine mammal is seen approaching or entering a relevant exclusion zone (as specified in § 217.224(5)(i)), observers will immediately notify the construction personnel operating the pile-related equipment to shut down pile-related activities.

(ii) If a marine mammal(s) is present within the applicable exclusion zone prior to in-water pile-related activities, pile driving/removal shall be delayed until the animal(s) has left the exclusion zone or until 15 minutes (pinniped or small cetacean) or 30 minutes (large cetacean) have elapsed without observing the animal.

(7) Additional mitigation measures as contained in an LOA issued under §§ 216.106 and 217.226 of this chapter.

§ 217.225 Requirements for monitoring and reporting.

(a) When conducting the activities identified in § 217.220(a), the monitoring and reporting measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented. These measures include:

(1) Visual Monitoring. (i) In addition to the mitigation monitoring described in § 217.224 of this chapter, at least two protected species observers shall be positioned on land near the 2.5 mile exclusion zone to monitor for marine mammals during vibratory pile-related activities or any other construction activities that may pose a threat to marine mammals.

(A) Observers shall use the naked eye, wide-angle binoculars with reticles, and any other necessary equipment to scan the Level B harassment isopleth.

(B) Observers shall work, on average, eight hours per day and shall be relieved by a fresh observer if pile driving lasts longer than usual (i.e., 12-16 hours).

(C) The number of observers shall be increased and/or positions changed to ensure full visibility of the Level B harassment isopleth.

(D) Land-based visual monitoring shall be conducted during all days of vibratory pile driving.

(E) All land-based monitoring shall begin at least 30 minutes prior to the start of in-water pile-related activities, and continue during active construction and for 30 minutes following the end of in-water pile-related activities.

(ii) At a minimum, observers shall record the following information:

(A) Date of observation period, monitoring type (land-based/boat-based), observer name and location, climate and weather conditions, and tidal conditions;

(B) Environmental conditions that could confound marine mammal detections and when/where they occurred;

(C) For each marine mammal sighting, the time of initial sighting and duration to the end of the sighting period;

(D) Observed species, number, group composition, distance to pile-related activities, and behavior of animals throughout the sighting;

(E) Discrete behavioral reactions, if apparent;

(F) Initial and final sighting locations marked on a grid map; and

(G) Pile-related activities taking place during each sighting and if/why a shutdown was or was not triggered.

(2) Acoustic Monitoring. (i) Acoustic monitoring shall be conducted during in-water pile-related activities to identify or confirm noise levels for pile-related activities during in-water construction.

(A) Acoustic data shall be collected using hydrophones connected to a drifting boat to reduce the effect of flow noise and an airborne microphone. There shall be a direct line of acoustic transmission through the water column between the pile and the hydrophones in all cases, without any interposing structures, including other piles.

(B) A stationary two-channel hydrophone recording system shall be deployed to record a representative sample (subset of piles) during the monitoring period. Acoustic data shall be collected 1 m below the water surface and 1 m above the sea floor.

(ii) Background noise recordings (in the absence of pile driving) shall be collected to provide a baseline background noise profile. The results and conclusions of the study shall be summarized and presented to NMFS with recommendations for any modifications to the monitoring plan or exclusion zones.

(iii) All sensors, signal conditioning equipment, and sampling equipment shall be calibrated at the start of the monitoring period and rechecked at the start of each day.

(iv) Prior to monitoring, water depth measurements shall be taken to ensure that hydrophones do not drag on the bottom during tidal changes.

(v) Underwater and airborne acoustic monitoring shall occur for the first five steel sheet pile and the first five concrete piles during the duration of pile driving. If a representative sample has not been achieved after the five piles have been monitored (e.g., if there is high variability of sound levels between pilings), acoustic monitoring shall continue until a representative acoustic sample has been collected.

(vi) Acoustic data shall be downloaded periodically (i.e., daily or on another appropriate schedule) and analyzed following the first year of construction. Post-analysis of underwater sound level signals shall include the following:

(A) RMS values (average, standard deviation/error, minimum, and maximum) for each recorded pile. The 10-second RMS averaged values will be used for determining the source value and extent of the 120 dB underwater isopleth;

(B) Frequency spectra for each functional hearing group; and

(C) Standardized underwater source levels to a reference distance of 10 m (33 ft).

(vii) Post-analysis of airborne noise would be presented in an unweighted format and include:

(A) The unweighted RMS values (average, minimum, and maximum) for each recorded pile. The average values would be used for determining the extent of the airborne isopleths relative to species-specific criteria;

(B) Frequency spectra from 10 Hz to 20 kHz for representative pile-related activity; and

(C) Standardized airborne source levels to a reference distance of approximately 15 m (50 ft).

(viii) In the event noise levels surpass estimated levels for extended periods of time, construction shall be stopped and NMFS shall be contacted to discuss the cause and potential solutions.

(3) General Reporting. (i) All marine mammal sightings shall be documented by observers on a NMFS-approved sighting form.

(ii) Marine mammal reporting shall include all data described previously under Proposed Monitoring, including observation dates, times, and conditions, and any correlations of observed marine mammal behavior with activity type and received levels of sound, to the extent possible.

(iii) A report with the results of all acoustic monitoring shall include the following:

(A) Size and type of piles;

(B) A detailed description of any sound attenuation device used, including design specifications;

(C) The impact hammer energy rating used to drive the piles, make and model of the hammer(s), and description of the vibratory hammer;

(D) A description of the sound monitoring equipment;

(E) The distance between hydrophones and depth of water and the hydrophone locations;

(F) The depth of the hydrophones;

(G) The distance from the pile to the water's edge;

(H) The depth of water in which the pile was driven;

(I) The depth into the substrate that the pile was driven;

(J) The physical characteristics of the bottom substrate into which the pile were driven;

(K) The total number of strikes to drive each pile;

(L) The results of the hydroacoustic monitoring, including the frequency spectrum, ranges and means for the peak and RMS sound pressure levels, and an estimation of the distance at which RMS values reach the relevant marine mammal thresholds and background sound levels.

(M) Vibratory driving results would include the maximum and overall average RMS calculated from 30-s RMS values during the drive of the pile; and

(N) A description of any observable marine mammal behavior in the immediate area and, if possible, correlation to underwater sound levels occurring at that time.

(iv) An annual report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office. The annual reports shall summarize include data collected for each marine mammal species observed in the project area, including descriptions of marine mammal behavior, overall numbers of individuals observed, frequency of observation, any behavioral changes and the context of the changes relative to activities would also be included in the annual reports, date and time of marine mammal detections, weather conditions, species identification, approximate distance from the source, and activity at the construction site when a marine mammal is sighted.

(v) A draft comprehensive report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office, 180 days prior to the expiration of the regulations. The comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first 4.5 years of the regulations. A revised final comprehensive technical report, including all monitoring

results during the entire period of the regulations, shall be due 90 days after the end of the period of effectiveness of the regulations.

(4) Reporting Injured or Dead Marine Mammals. (i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by an LOA (if issued), such as an injury (Level A harassment), serious injury, or mortality, the Holder shall immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the following information:

- (A) Time and date of the incident;
- (B) Description of the incident;
- (C) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (D) Description of all marine mammal observations in the 24 hours preceding the incident;
- (E) Species identification or description of the animal(s) involved;
- (F) Fate of the animal(s); and
- (G) Photographs or video footage of the animal(s).

(ii) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Holder to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Holder may not resume their activities until notified by NMFS.

(iii) In the event that the Holder discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and

the death is relatively recent (e.g., in less than a moderate state of decomposition), the Holder shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the same information identified in § 217.225(a)(3) of this chapter. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Holder to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iv) In the event that the Holder discovers an injured or dead marine mammals, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in the LOA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Holder shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator, within 24 hours of the discovery. The Holder shall provide photographs or video footage or other documentation of the stranding animal sighting to NMFS.

§ 217.226 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the applicant must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Holder must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Holder must apply for and obtain a modification of the LOA as described in § 217.227.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species and its habitat; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the Federal Register within 30 days of a determination.

§ 217.227 Renewals and Modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)) that do not change the findings made for the regulations or that result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the Federal Register, including the associated analysis illustrating the change, and solicit public comments before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management – NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Holder regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include the following:

- (A) Results from the Holder's monitoring from the previous year(s);
- (B) Results from other marine mammal and/or sound research or studies;
- (C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the Federal Register and solicit public comments.

(2) Emergencies – If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.222(b), an LOA may be modified without prior notice or opportunity for public comment. Notice of such action will be published in the Federal Register within 30 days of the action.

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